Supreme Court, U.S.
FILED

No. 952037 JUN 17 1996

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In The

# Supreme Court of the United States

October Term 1995

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**EDWARD PICKLESIMER,**

*Petitioner,*

v.

**LEE COX, Individually;**
**REX YATES, In his representative capacity;**
**STATE OF NORTH CAROLINA;**
**ADMINISTRATIVE OFFICE OF**
**THE COURTS, Juvenile Services Division,**

*Respondents.*

**ON PETITION FOR WRIT OF CERTIORARI**
**TO THE UNITED STATES COURT OF APPEALS**
**FOR THE FOURTH CIRCUIT**

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## Petition for Writ of Certiorari

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## I. STATEMENT OF QUESTIONS PRESENTED

1. Are there genuine issues as to any material facts concerning petitioner's constitutional claims against respondent Cox, in her individual capacity, sufficient to withstand respondents' motion for summary judgment?

2. Are there genuine issues as to any material facts sufficient to overcome respondents' motion for summary judgment as to petitioner's tort claim for intentional infliction of emotional and mental distress?

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The opinion sought to be reviewed is Picklesimer v. Cox, et al., No. 95-1342 (4th Cir. March 19, 1996), an unreported per curiam opinion. (App. pp.1-4). The District Court opinion, Picklesimer v. Cox, No. CA-93-74-4 (W.D. N.C. February 2, 1995), is unpublished. (App. pp. 5-10).

## V. JURISDICTION

Petitioner seeks this Court's review of the judgment entered on March 19, 1996, by the United States Circuit Court of Appeals for the Fourth Circuit on appeal from the United States District Court for the Western District of North Carolina at Shelby. This Petition is timely filed because it was filed within ninety days of March 19, 1996, the date of entry of judgment in the court below. Rules 13.4 and 29.2.

## VI. STATUTE INVOLVED

42 U.S.C. § 1983 Civil Action for Deprivation of Rights

Every person who, under color of any statute, ordinance regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

## VII. STATEMENT OF THE CASE

### Procedural History

On April 27, 1993, petitioner Edward Picklesimer filed a complaint in Burke County Superior Court alleging various state and federal claims. Petitioner's causes of action included: 1) violations of freedom of speech and freedom of association pursuant to 42 U.S.C. § 1983, 2) violations of the First and Fourteenth Amendments of the United States Constitution and/or applicable provisions of the North Carolina State Constitution, 3) tortious interference with petitioner's contract of employment, 4) intentional infliction of emotional and mental distress.

Respondent, along with her co-defendants, filed a motion to dismiss pursuant to F.R. Civ. P. 12(b)(6), to which petitioner responded. A memorandum and recommendation was entered on August 18, 1993, by United States Magistrate Judge J. Toliver Davis. Thereafter, an order was entered on January 20, 1994, by Richard L. Voorhees, Chief Judge of the United States District Court for the Western District, Shelby Division, which dismissed petitioner's claims for punitive damages; dismissed all claims against defendants Cox and Yates in their official capacities; and dismissed defendants State of North Carolina and the Administrative Office of the Courts, Juvenile Services Division. The court allowed petitioner to proceed with his modified first and third causes of action, alleging tortious interference with contract and intentional infliction of emotional and mental distress, against defendant/respondent Cox in her individual capacity.

Respondent Cox filed a motion for summary judgment on or about June 3, 1994, together with various affidavits in support of said motion. (App. pp. 14-15). Petitioner filed a response, affidavits and objections to respondent's motion. (App. pp. 28-36).

A memorandum and recommendation that respondent's motion for summary judgment be granted and the remaining causes of action dismissed was entered by United States District Court Magistrate Judge J. Toliver Davis on June 24, 1994. On February 2, 1995, the Honorable Richard L. Vorhees, Chief Judge of the United States District Court for the Western District, entered judgment dismissing the case on the merits. (App. pp. 11)

Petitioner gave timely written notice of appeal to the Fourth Circuit Court of Appeals as to the entry of summary judgment. On March 19, 1996, the Fourth Circuit affirmed the judgment below in an unpublished per curiam opinion. (App. pp. 1-4).

## Factual Summary

On January 2, 1976, petitioner was employed by the State of North Carolina through the Administrative Office of the Courts, Juvenile Services Division, and continued in that capacity until March 28, 1991, when he was unjustly terminated or forced to resign from his position. Petitioner alleges that during the course of his employment, respondent Lee Cox set about on a course of conduct which interfered with, and eventually led to the termination, of his employment with the state, by demeaning his character, by giving unfair performance reviews of his work, by making derogatory statements to his superiors and others that indicated her lack of confidence in petitioner's abilities, and by systematically engaging in a plan or design to cause termination of his employment or his transfer without just cause.

When petitioner was originally employed, he worked in three counties, encompassing the Twenty-Fifth Judicial District of North Carolina. However, beginning in May, 1976, another counsellor was hired to cover one of the counties. A former counsellor in the district had experienced many of the same problems petitioner did with respondent Cox, including

personal attacks, snide remarks and dissemination of improper information, leading to his resignation in late 1988. In 1995, petitioner began having personal problems with respondent which resulted in consistently poor evaluations.

Petitioner contends that respondent consistently tried to single out issues through which she could attack petitioner professionally and personally. On occasion she bragged that she would "drive" petitioner from his job. Beginning in 1990 and 1991, respondent reported various allegations regarding petitioner's job performance to co-defendant Rex Yates and others, as were shown in defendants' affidavits. Petitioner pointed out respondent's errors and overstatements in his own affidavit. Under respondent's supervision, petitioner filed at least four grievances alleging her inadequacies as a supervisor and her personal attacks on petitioner.

As a result of respondent's improper conduct, petitioner was given notification on the last day of the month at 4:20 p.m. of a job transfer to Winston-Salem, which is located over one-hundred miles from petitioner's home in Burke County, North Carolina. The alleged transfer was in fact a forced resignation based on the unconstitutional and tortious acts of respondent and co-defendants. When petitioner did not accept the job transfer, he was terminated on behalf of Franklin Freeman of defendant Administrative Office of the Courts.

Petitioner brought this action seeking relief and is now seeking review by this Court of the summary judgment entered and affirmed by the courts below.

## ARGUMENT

### The Courts Below Erred in Granting Respondent Cox's Motion for Summary Judgment Concerning the Constitutional Claims Against Her in Her Individual Capacity

#### Summary Judgment Generally

The federal law of summary judgment closely parallels North Carolina State law regarding the use of this procedural device. In a motion for summary judgment, the burden is on the moving party to establish there is no genuine issue of material fact and that the movant is entitled to judgment as a matter of law. Gavin v. Peoples Natural Gas Co., 613 F.2d 482 (Pa. 1980); Norfolk & Western K. Co. v. Werner Industries, 286 N.C. 89, 209 S.E.2d 734 (1974) [other citations omitted]. An issue is material if the facts alleged would constitute a legal defense, or would affect the results of the action or if its resolution would prevent the party against whom it is resolved from prevailing in the action. An issue is denominated "genuine" if it may be maintained by substantial evidence. Koontz v. City of Winston-Salem, 280 N.C. 513, 186 S.E.2d 897 (1972) [other citations omitted].

The critical questions for determination by the court in considering a motion for summary judgment is whether the pleadings, depositions, answers to interrogatories and admissions on file, together with any affidavits, establish a genuine issue as to any material fact. Associated Press vs. United States, 326 U.S. 1, 65 S. Ct. 416, 89 L. Ed. 2013 (1945), reh'g denied, 326 U.S. 802, 66 S. Ct. 6, 90 L. Ed. 489, (1945); Johnston Co. Tuberculosis Ass'n. v. North Carolina Tuberculosis & Respiratory Disease Ass'n., 15 N.C. App. 492, 190 S.E.2d 264 (1972) [other citations omitted]. A court must look at the record in the light most favorable to the party opposing the motions (Clifton v. Fesperman, 50 N.C. App.

178, 272 S.E.2d 624 (1980)), and plaintiffs are entitled to the benefit of every reasonable inference which may legitimately be drawn on their evidence. Vickery v. Olin Hill Construction Co., Inc., et al., 47 N.C. App. 98, 266 S.E.2d 711 (1980).

Before summary judgment may be had, the record must affirmatively show that not only would the moving party be entitled to judgment from the evidence before the court, but it must also show that there can be no other evidence from which a jury could reach a different conclusion as to a material fact. SEC v. International Mining Exchange, Inc., 515 F. Supp. 1062 (Colo. 1981); Goode v. Tait, Inc., 36 N.C. App. 268, 243 S.E.2d 404, cert. denied, 295 N.C. 465, 246 S.E. 2d 215 (1978) [other citations omitted].

Petitioner contends that the verified complaint, his affidavit (App. pp. 37-53), and the affidavit of Evelyn J. Picklesimer (App. pp. 54-56) establish genuine issues of material facts which could or would have led to a different result at trial. They are therefore genuine within a legal sense and they are material, since they deal with crucial issues affecting the claims asserted under the theory that all such allegations are deemed true for purposes of a summary judgment hearing. It is respectfully contended that the courts below erred in granting summary judgment for respondent.

## Qualified Immunity

Respondent Lee Cox in her individually moved for summary judgment and asserted there was no genuine issue of material fact as to whether she is entitled to qualified immunity. The test regarding qualified immunity states that:

> "government officials performing discretionary functions generally are shielded from liability for civil damages **insofar as their conduct does not violate clearly established statutory or constitutional rights of which a**

**reasonable person would have known"** [emphasis added].

Harlow v. Fitzgerald, 457 U.S. 800, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982). Whether state and local executive or administrative officials are accorded only qualified immunity from liability under 42 U.S.C. § 1983 depends upon the circumstances and motivations of respondent's actions as established by evidence at trial. Williams v. Anderson, 562 F. 2d 1081 (Ark. 1977). Further, the qualified immunity/good faith defense to actions brought under 42 U.S.C. § 1983 contains subjective and objective components. The question is not only whether respondent acted with good intentions, but whether she had reasonable grounds at the time for forming her beliefs and in light of all circumstances, whether her conduct was constitutional. Duchesne v. Sugarman, 566 F. 2d 817 (N.Y. 1977). As previously stated by petitioner and by corroborating evidence, there is an issue of fact as to the extent of the knowledge respondent had when usurping the constitutional rights of petitioner and others. Her inaction in light of her knowledge serves as the basis for petitioner's claim. For that reason, respondent's motion for summary judgment based on qualified immunity should have been denied, and petitioner should be permitted to offer evidence for the trier of fact to determine.

It is respectfully contended that petitioner has offered through affidavits and the forecast of evidence contained therein genuine issues of material fact. It should be remembered that all inferences, including creditability of an affiant, are drawn in favor of the plaintiff for qualified immunity purposes. Gordon v. Kidd, 971 F. 2d 1087, 1093-94 (4th Cir. 1992). It is undisputed that the right allegedly violated by respondent against petitioner was clearly established at the time. From petitioner's affidavit, which was taken as true, there is evidence that the State official, in this case, Ms. Cox, knew that her conduct was unlawful and

despite such knowledge persisted in that conduct, all of which are genuine issues of material fact. Petitioner has established in his affidavit and the forecast of evidence that respondent's activities were irresponsible or in violation of clearly established law, were corrupt, malicious, and beyond the scope of her official duties. It is contended that petitioner has met the burden of showing all of this by his supporting documentation. Therefore, respondent is not entitled to summary judgment in her favor as to the defense of qualified immunity.

**Protected Speech**

Respondent has contended that the petitioner's First Amendment claim cannot survive summary judgment because petitioner was not able to produce any evidence that his "speech" was on a matter "public concern" as required under Connick v. Myers, 461 U.S. 138 (1983), Berger v. Battaglia, 779 F. 2d 992 (4th Cir. 1985).

Petitioner contends that he was terminated from employment in violation of his rights protected by the First Amendment of the United States Constitution. The proper test for evaluating Plaintiff's claim is set forth in Daniels v Quinn, 801 F. 2d 687 (4th Cir. 1986). To determine whether the First Amendment shields a public employee from discharge for protected speech, a three-part inquiry in employed. (Since each part affords a possible independent basis for judgment, the order of inquiry may vary with the circumstances of the case.)

The first step is to ask whether the speech was about a matter of legitimate public concern. This question is one of law, not of fact. Jones v. Dobson, 727 F. 2d 1329, 1334 (4th Cir. 1984). If the speech was about a matter of public concern, the question becomes whether the employee would have been discharged "but for" the speech. The defendant-employer will not be liable if the discharge would have

occurred for other reasons, such as the plaintiff's own incompetence. This classic motivational question is one of fact. The employee bears the burden of demonstrating that protected speech was a motivating factor in the discharge. The burden then shifts to the employer to show that it would have reached the same decision even in the absence of the protected conduct. Mt. Healthy v. Doyle, 429 U.S. at 287, 97 S. Ct. at 576. If protected speech was the "but for" cause of the discharge, courts must still inquire whether the degree of public interest in the employee's statement was nonetheless outweighed by the employer's responsibility to manage its internal affairs and provide "effective and efficient" service to the pubic. If so, then the employer will not be liable. This question is ultimately one of law. Connick v. Myers, 461 U.S. 138, 103 S. Ct. 1684, 75 L. Ed. 2d 708 (1983).

Petitioner's affidavit clearly establishes that the speech complained of was constitutionally protect since it (1) related to matters to matters of public concern, Connick v. Myers, supra, at 146; and (2) the interest of the speaker in the speech outweighed the interests of the employer in maintaining an efficient work place, Pickering v. Board of Education, 391 U.S. 563 (1968). The speech complained of could be fairly considered as relating to matters of political, social, or other concern to the community as required by Connick and clearly was protected by the First Amendment. Here both prongs of the tests were met, as shown by petitioner's affidavit, which was considered to be true at this juncture. Therefore, the motion for summary judgment should have been denied.

**The Courts Below Erred in Granting Respondent's Motion for Summary Judgment as to Petitioner's Claim of Intentional Infliction of Emotional and Mental Distress**

It is respectfully contended that the essential elements in an action for intentional infliction of emotional distress are: (1) extreme and outrageous conduct by Defendant; (2) which

is intended to and does, in fact, cause; (3) severe emotional distress. Dickens v. Puryear, 302 N.C. 437, 276 S.E. 2d 325 (1981). In the context of the claim of intentional infliction of mental distress, the Court has stated that:

> "the term severe emotional and mental distress means any emotional or mental disorder, such as for example neuroses, psychoses, chronic depression, phobia, or any other type of severe and disabling emotional or mental condition which may be generally recognized and diagnosed by a professional trained to do so."

Waddle v. Sparks, 331 N.C. 73, 414 S.E. 2d 22 (1992), quoting Johnson v. Ruark Obstetrics and Gynecology Ass'n., 327 N.C. 283, 295 S.E.2d 85, reh'g denied, 327 N.C. 644, 399 S.E.2d 133 (1990).

Petitioner contends that the conduct exhibited by respondent in this case was extreme, outrageous, without justification, and intended to cause him to suffer mental and emotional trauma. Petitioner's own affidavit and the affidavit of his wife, which is offered for corroboration, detail the effects of respondent's tortious actions.

Respondent has cited numerous cases which support her position that she and her co-defendants in the instant action did not act in either so extreme or so outrageous a manner as to support a claim for intentional infliction of emotional distress. However, as demonstrated by affidavits and depositions in this case, it is apparent that the conduct she exhibited placed petitioner's entire career and livelihood, in which he had invested numerous years of his life, in jeopardy. The severity of respondent's conduct is an issue of fact for jury determination and should survive a motion for summary judgment. Similarly, petitioner's forecast of evidence provides a factual issue as to the elements of intent and causation for a fact finder to determine. Finally, the severity of emotional

distress petitioner suffered is documented in his affidavit and corroborated by supporting affidavits. Petitioner was, in fact, suffering from chronic depression to such a degree that he was effectively unable to conduct his personal and family affairs. His depression would have been recognized and diagnosed as such by a competent professional of proper training, experience and expertise. [See generally Diagnostic and Statistical Manual of Mental Disorders (3d ed., Rev.), 222-24.)]

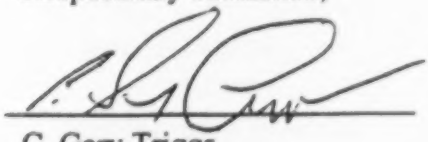
In addition to severe depression, petitioner suffered from coronary problems which were well-known to respondent who, despite this knowledge, engaged in a course of activity that she knew or likely should have known would increase the anxiety and potential for petitioner to suffer additional heart problems.

Petitioner's affidavit and the affidavit of the corroborating witness establish that such activities on respondent's part did in fact cause additional problems. The forecast of evidence from the physician clearly indicates that all of the requirements for proving a case for intentional infliction of emotional distress or in the alternative, negligent infliction of emotional distress, have been met. Therefore, the motion for summary judgment should have been denied.

## CONCLUSION

For the reasons set forth herein, it is respectfully contended that the motion for summary judgment should have been denied. Petitioner has shown that there are genuine issues of material fact that requiring the submission of this case to a jury for determination.

Respectfully submitted,



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No. _____

In The

# Supreme Court of the United States

October Term 1995

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**EDWARD PICKLESIMER,**

***Petitioner,***

v.

**LEE COX, Individually;**
**REX YATES, In his representative capacity;**
**STATE OF NORTH CAROLINA;**
**ADMINISTRATIVE OFFICE OF**
**THE COURTS, Juvenile Services Division,**

***Respondents.***

**ON PETITION FOR WRIT OF CERTIORARI**
**TO THE UNITED STATES COURT OF APPEALS**
**FOR THE FOURTH CIRCUIT**

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## Appendix to Petition for Writ of Certiorari

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**UNPUBLISHED**

**UNITED STATES COURT OF APPEALS**
**FOR THE FOURTH CIRCUIT**

EDWARD PICKLESIMER,
Plaintiff-Appellant,

v.

LEE COX, Individually; REX YATES,
In his representative capacity; STATE
OF NORTH CAROLINA; ADMINISTRATIVE
OFFICE OF THE COURTS, Juvenile
Services Division,
Defendants-Appellees.

No. 95-1342

Appeal from the United States District Court
for the Western District of North Carolina, at Shelby.
Richard L. Voorhees, Chief District Judge.
(CA-93-74-4)

Submitted: March 5, 1996
Decided: March 19, 1996
Entered: March 19, 1996

Before LUTTIG and MOTZ, Circuit Judges, and PHILLIPS,
Senior Circuit Judge.

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Affirmed by unpublished per curiam opinion.

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## COUNSEL

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Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

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## OPINION

PER CURIAM:

Appellant Edward Picklesimer appeals the district court's decision granting summary judgment to Defendant Lee Cox. Picklesimer's action alleged violations of 42 U.S.C. § 1983 (1988) and intentional infliction of emotional distress. Finding no error, we affirm.

From 1989 until 1991, Picklesimer worked under Cox's supervision as a juvenile court counsellor in the North Carolina Administrative Office of the Courts-Juvenile Services Division. He claimed Cox made derogatory comments in public and private about his work abilities, gave him unfair performance reviews, and generally planned for his termination or transfer. Picklesimer complained to Cox's superiors at least four times about her supervisory failures, administrative inadequacies, and personal attacks upon him, but to no avail. Ultimately, Cox recommended terminating Picklesimer, allegedly because he withheld cases for review, failed to provide services to juveniles, and dropped juveniles from supervision without authorization. Instead of terminating

him, though, Cox agreed to transfer Picklesimer to an office approximately 100 miles from Picklesimer's home. Picklesimer refused the transfer and quit his job. He claimed this amounted to a constructive termination in violation of his First Amendment right to complain about Cox's behavior.

We review a district court's grant of summary judgment de novo. Foster v. American Home Prods. Corp., 29 F.3d 165, 168 (4th Cir.1994). To determine whether Picklesimer established a First Amendment claim, we must analyze (1) whether Picklesimer's involved an issue of public concern; (2) whether Cox would have fired Picklesimer but for his protected speech; and (3) whether Picklesimer's exercise of free speech is outweighed by the "'countervailing interest of the state in providing the public service [Picklesimer] was hired to provide.'" Hall v. Marion School Dist. No. 2, 31 F.3d 183, 192 (4th Cir. 1994) (quoting Stroman v. Colleton County Sch. Dist., 981 F.2d 152, 156 (4th Cir. 1992)). A court evaluating such a claim must attempt to balance the employee's interest in speaking as a citizen about a matter of public concern with the state's interest as an employer to efficiently provide public service. Connick v. Myers, 461 U.S. 138, 142 (1983) (citing Pickering v. Board of Education, 391 U.S. 563, 568 (1968)).

Picklesimer's claims fails because his speech did not concern a matter of public concern, but only a matter of personal interest. His grievance to Cox's superiors related to Cox's "failure as a supervisor, her inadequacies in administrative duties and her personal attacks on [Picklesimer]." Such complaints do not involve matters of public concern but personal interest, and thus do not establish a claim under the First Amendment. See Connick, 461 U.S. at 154.

Further, Picklesimer failed to establish the intentional infliction of emotional distress. The tort requires offensive conduct so extreme and outrageous that it "'exceeds all bounds usually tolerated by decent society.'" Stanback v. Stanback,

254 S.E.2d 611, 622 (N.C. 1979) (quoting William Prosser, THE LAW OF TORTS, § 12, p. 56 (4th ed. 1971)). While Cox's behavior toward Picklesimer may have been unwarranted or unnecessary, it was not so outrageous as to exceed the bounds of decent society. See Wilson v. Bellamy, 414 S.E.2d 347, 359 (N.C. App.), rev. denied, 418 S.E.2d 668 (N.C. 1992).

Finally, to the extent Picklesimer seeks to appeal the dismissal of the remaining Defendants, he waived appellate review by failing to object to the magistrate judge's report and recommending dismissal of the action as to all Defendants except Cox. Wright v. Collins, 766 F.2d 841, 845-46 (4th Cir. 1985).

Accordingly, we affirm the district court's decision. We dispense with oral argument because the facts and legal contentions are adequately presented in the material before the court and argument would not aid the decisional process.

AFFIRMED

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
(SHELBY DIVISION)
CIVIL NO. 4:93CV74

| | | |
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| | ) | |
| LEE COX, | ) | |
| | ) | |
| Defendants. | ) | |

Entered: February 2, 1995

THIS MATTER is before the Court on the Plaintiff's objections to the Memorandum and Recommendation of Chief United States Magistrate Judge J. Toliver Davis, filed June 24, 1994. Pursuant to standing orders of designation and 28 U.S.C. § 636, this Court referred the Defendant's motion for summary judgment to the Magistrate Judge for a recommendation as to disposition. The Magistrate Judge recommended that Defendant's motion be allowed and the action dismissed in its entirety. For the reasons stated below, this Court adopts the Memorandum and Recommendation.

## I. PROCEDURAL AND FACTUAL BACKGROUND

Plaintiff initiated this action against his supervisor, Defendant Lee Cox (Cox), in her individual capacity pursuant to 42 U.S.C. § 1983. Plaintiff was employed by the State of North Carolina, Administrative Office of Courts, Juvenile Service Division, as a juvenile counselor. In 1991, he was offered a transfer to another judicial district which he

declined to accept and he left his employment with the State. Thereafter, he brought this suit alleging that his history of disagreements with Cox caused him to file grievances within the Administrative Office of Courts which amounted to protected speech. Thus, he claims his transfer, which he characterizes as termination, violated his constitutional right to free speech. He also accuses Cox of intentional infliction of emotional distress.

Plaintiff failed to respond to the motion for summary judgment. While noting Plaintiff's failure to file response, the Magistrate Judge nonetheless engaged in a detailed analysis of the law. After the Memorandum and Recommendation was filed, Plaintiff's counsel requested leave to file response to the motion for summary judgment and to file objections. Counsel explained that because of a clerical error, the motion failed to be docketed for response. The Court will grant counsel's motion for leave to make late filing, thus allowing the responses to the motion for summary judgment. Those submissions have been considered in ruling on Plaintiff's objections.

This Court conducts a *de novo* review of that portion of the Memorandum and Recommendation to which objections have been filed. 28 U.S.C. § 636(b). In conducting this review, the Court has considered Plaintiff's responses to the motion for summary judgment.

## II. DISCUSSION

Plaintiff raises the following objections to the Memorandum and Recommendation. First, Plaintiff objects to the characterization that he quit his job, claiming he was constructively discharged. Second, he objects to the Magistrate Judge's determination that he failed to respond to the motion for summary judgment. Because this Court has allowed the late filing of Plaintiff's responses to the motion for summary judgment, this objection is rendered moot.

Plaintiff also objects to the determination that qualified immunity precludes this suit against Cox in her individual capacity. Finally, Plaintiff objects to the Magistrate Judge's recommendation that the cause of action for intentional infliction of emotional distress be dismissed.

In order to sustain a cause of action under § 1983, Plaintiff must show that Cox, in her individual capacity, deprived him of a constitutional right while acting under color of state law. Plaintiff argues that the constitutional right violated was his right to free speech. However, Plaintiff's submissions in response to the motion for summary judgment show a pattern of filing grievances against Cox with her superiors, complaints by him to Cox, and others, about his performance evaluations, and other employment related matters.

> Personal grievances, complaints about conditions of employment, or expressions about other matters of personal interest do not constitute speech about matters of public concern that are protected by the First Amendment, but are matters more immediately concerned with the self-interest of the speaker as employee. *Connick v. Myers*, 461 U.S. 138, 147, 103 S.Ct. 1684, 1690, 75 L.Ed.2d 708 (1983). The limit of First Amendment protections was thus described in *Connick*:
>
> > While as a matter of good judgment, public officials should be receptive to constructive criticism offered by their employees, the First Amendment does not require a public office to be run as a

> roundtable for employee complaints over internal office affairs. *Id.* at 149, 103 S.Ct. at 1691.

*Stroman v. Colleton County School Dist.*, 981 F.2d 152, 156 (4th Cir. 1992).

From Plaintiff's submissions, it appears that he began to complain about Cox as early as 1987, expressing great disdain for her leadership and managerial skills both to her and her superiors. To the extent Plaintiff claims Cox was "out to get him" because her notified her superiors of her deficient performance, Plaintiff still has not engaged in free speech because all the complaints were made within the context of his own employment or made within the system itself, not in a public forum. *Id.* The "main thrust of the matter involved internal employee grievances," although they may have touched on matters of public concern. *Hall v. Marion School Dist.* No. 2, 31 F.3d 183, 195 (4th Cir. 1994). This Court finds as a matter of law that the expression was not public, concerned employee grievances, and does not constitute free speech. *Stroman, supra.*

Moreover, Plaintiff's submissions show that he repeatedly received unfavorable performance evaluations. Plaintiff did not keep adequate records, was neglectful of dictation responsibilities, and actually failed to supervise three different juveniles in direct defiance of state court orders. Moreover, while Cox recommended termination of Plaintiff, the actual decision was made by her superiors who determined to offer Plaintiff a transfer, not to terminate him. Plaintiff became unemployed because of his refusal to relocated in order to keep his job. Thus, even if Cox had engaged in retaliatory conduct, an assumption which the Court accepts only for purposes of the motion, Cox has shown Plaintiff's performance was the reason for his

transfer. *Id.* He would not have remained in the district "but for" his complaints. *Id.*

This Court also rejects Plaintiff's objection to the Magistrate Judge's characterization that he "quit" his job. Plaintiff's own submissions show he was offered a transfer to a different district, Winston-Salem. It was his decision to leave state employment rather than be transferred. This does not constitute constructive discharge.

The Magistrate Judge's conclusions concerning the intentional infliction of emotional distress are accurate and do not require further comment. *See, e.g., Dickens v. Puryear*, 302 N.C. 437, 276 S.E.2d 325 (1981); *Wilson v. Bellamy*, 105 N.C. App. 446, 414 S.E.2d 347, *review denied*, 331 N.C. 558, 418 S.E.2d 668 (1992) (holding that the rape of plaintiff by numerous members of a fraternity did not constitute the type of outrageous conduct which exceeds all bounds usually tolerated by decent society).

Likewise, the recommendations concerning Cox's qualified immunity are correct. Cox performed her job in advising her superiors of difficulties with Plaintiff's performance. This does not amount to conduct which violated clearly established constitutional rights of which a reasonable person would have known. Moreover, since the Court finds Plaintiff did not exercise a form of protected speech, there was no right which could have been violated.

The Court therefore finds the factual statement in the Memorandum and Recommendation accurate, as amended above upon consideration of Plaintiff's responses to the motion for summary judgment. The legal conclusions are accurate and supported by current case law. The Court therefore adopts the recommendation that the action be dismissed.

## III. ORDER

IT IS, THEREFORE, ORDERED that Defendant's motion for summary judgment is hereby GRANTED, and the remaining causes of action will be dismissed by way of judgment filed herewith.

THIS the 2nd day of February, 1995.

/s/ Richard L. Voorhees
RICHARD L. VOORHEES, CHIEF JUDGE
UNITED STATES DISTRICT COURT

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
(SHELBY DIVISION)
CIVIL NO. 4:93CV74

| | | |
|---|---|---|
| EDWARD PICKLESIMER, | ) | |
| | ) | |
| Plaintiff, | ) | |
| v. | ) | |
| | ) | JUDGMENT |
| LEE COX, | ) | |
| | ) | |
| Defendant. | ) | |

Entered: February 2, 1995

For the reasons stated in the Memorandum and Order filed herewith,

IT IS ORDERED, ADJUDGED AND DECREED that the Defendant's motion for summary judgment is ALLOWED, and this matter is hereby DISMISSED ON THE MERITS in its entirety.

THIS the 2nd day of February, 1995.

/s/ Richard L. Voorhees
RICHARD L. VOORHEES, CHIEF JUDGE
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
(SHELBY DIVISION)
FILE NO. 4:93CV74

| | | |
|---|---|---|
| EDWARD PICKLESIMER, Plaintiff, v. LEE COX, INDIVIDUALLY, AND IN HER REPRESENTATIVE CAPACITY, REX YATES. IN HIS REPRESENTATIVE CAPACITY, STATE OF NORTH CAROLINA AND THE ADMINISTRATIVE OFFICE OF THE COURTS, JUVENILE SERVICE DIVISION, Defendants. | ) | VERIFICATION |

Lee N. Cox being duly sworn, deposes and says that she is the defendant in the foregoing action; that she has read the foregoing Answer and knows the contents thereof; that the same is true of her own knowledge except for those matters and things stated upon information and belief and as to those matters and things she believes the same to be true.

This the 25th day of January, 1994.

/s/ Lee N. Cox
Lee N. Cox

Subscribed and sworn to before me this the 25th day of January, 1994.

/s/ Nancy C. Storie
Notary Public

My Commission expires April 12, 1994.

(Notary Seal)

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
(SHELBY DIVISION)
FILE NO. 4:93CV74

| | | |
|---|---|---|
| EDWARD PICKLESIMER, | ) | |
| | ) | |
| Plaintiff, | ) | DEFENDANT |
| v. | ) | COX'S |
| | ) | MOTION FOR |
| LEE COX, INDIVIDUALLY, AND | ) | SUMMARY |
| IN HER REPRESENTATIVE | ) | JUDGMENT |
| CAPACITY, REX YATES. IN HIS | ) | |
| REPRESENTATIVE CAPACITY, | ) | |
| STATE OF NORTH CAROLINA | ) | |
| AND THE ADMINISTRATIVE | ) | |
| OFFICE OF THE COURTS, | ) | |
| JUVENILE SERVICE | ) | |
| DIVISION, | ) | |
| Defendants. | ) | |

Filed: June 3, 1994

NOW COMES the defendant LEE COX in her individual capacity by and through the undersigned attorney and moves the court pursuant to Rule 56 of the Federal Rules of Civil Procedure for Summary Judgment on all of the remaining claims in the above captioned action because the Plaintiff has failed to show a viable issue of material fact.

In support of this motion, Ms. Cox by and through her attorney submits the attached material:

1. A memorandum of law in support of this motion.
2. Her affidavits

3. Ivan Hill's affidavit
4. Jo Ann Wright's affidavit
5. Richard Bruder's affidavit
6. Thomas Danek's Affidavit

This the 3rd day of June, 1994.

MICHAEL F. EASLEY
ATTORNEY GENERAL

/s/ Lars F. Nance
Lars F. Nance
Special Deputy Attorney General
N. C. Department of Justice
P. O. Box 629
Raleigh, N.C. 27602-0629
(919) 733-6026
State Bar No. 012711

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
(SHELBY DIVISION)
FILE NO. 4:93CV74

| | | |
|---|---|---|
| EDWARD PICKLESIMER, | ) | |
| | ) | |
| Plaintiff, | ) | AFFIDAVIT IN |
| v. | ) | SUPPORT OF |
| | ) | MOTION FOR |
| LEE COX, INDIVIDUALLY, AND | ) | SUMMARY |
| IN HER REPRESENTATIVE | ) | JUDGMENT |
| CAPACITY, REX YATES. IN HIS | ) | |
| REPRESENTATIVE CAPACITY, | ) | |
| STATE OF NORTH CAROLINA | ) | |
| AND THE ADMINISTRATIVE | ) | |
| OFFICE OF THE COURTS, | ) | |
| JUVENILE SERVICE | ) | |
| DIVISION, | ) | |
| Defendants. | ) | |

LEE N. COX, being duly sworn deposes and says:

1. I am employed by the North Carolina Administrative Office of the Courts Juvenile Services Division as a Chief Court Counselor II for the Twenty-Fifth District Court District.

2. The Twenty-Fifth District comprises Burke, Caldwell and Catawba counties with offices located in Lencir, Morganton, Hickory and Newton.

3. I have been employed as a Chief court Counselor since November 1, 1975.

4. I have attached copies of the Twenty-Fifth District's Intake, Probation, and Aftercare Monthly reports for January 1988 through December 1991.

5. The monthly reports detail the various court counselors' caseloads.

6. One intake case is roughly considered the equivalent of one counseling case.

7. An analysis of the attached monthly report forms shows that Mr. Picklesimer never had the highest number of cases in any one month.

8. Mr. Picklesimer, as a full-time court counselor, routinely maintained at or near the lowest number of cases in District Twenty-Five.

9. Mr. Picklesimer's caseload was, to say the least, not disproportionately heavy. For example, looking at the attached reports, one sees Richard Bruder maintained a training school caseload until Mr. Picklesimer assumed the training school duties in November 1988. Mr. Picklesimer acquired the same number of cases that Mr. Bruder had the month before. Mr. Bruder reassumed the training school cases in March of 1990. He assumed the same caseload Mr. Picklesimer had the month before.

Further, affiant sayeth not.

/s/ Lee N. Cox
Lee N. Cox

Subscribed and sworn to before me this the 1st day of June, 1994.

/s/ Joanne Wright
Notary Public

My Commission expires: April 13, 1999.

(Notary Seal)

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
(SHELBY DIVISION)
FILE NO. 4:93CV74

| | | |
|---|---|---|
| EDWARD PICKLESIMER, | ) | |
| | ) | |
| Plaintiff, | ) | AFFIDAVIT IN |
| v. | ) | SUPPORT OF |
| | ) | MOTION FOR |
| LEE COX, INDIVIDUALLY, AND | ) | SUMMARY |
| IN HER REPRESENTATIVE | ) | JUDGMENT |
| CAPACITY, REX YATES. IN HIS | ) | |
| REPRESENTATIVE CAPACITY, | ) | |
| STATES OF NORTH CAROLINA | ) | |
| AND THE ADMINISTRATIVE | ) | |
| OFFICE OF THE COURTS, | ) | |
| JUVENILE SERVICE | ) | |
| DIVISION, | ) | |
| Defendants. | ) | |

IVAN HILL, being duly sworn deposes and says:

1. I am employed by the North Carolina Administrative Office of the Courts Personnel Services Division as the Administrator.

2. In my capacity as Administrator of AOC Personnel Services Division, I reviewed a complaint by Edward Picklesimer that he was denied access to his second level supervisor's personal notes about him as an employee.

3. Mr. Picklesimer had requested further review of this Area Administrator's November 19, 1990 decision that a subordinate could not force his supervisor to make such a disclosure.

4. Mr. Picklesimer requested review of his Area Administrator's decision in a letter dated December 26, 1990.

5. Dr. Danek, the Administrator of the Juvenile Services Division forwarded this request for review to me.

6. I affirmed the propriety of denying Mr. Picklesimer access to his supervisor's personal notes.

7. Mr. Freeman, the Director of the Administrative Office of the Courts accepted my recommendation.

8. Mr. Picklesimer, pursuant to Article 7 of Chapter 126 of the North Carolina General Statutes has access to his personnel file. Under my understanding and consistent with AOC's policy, Mr. Picklesimer's personnel file was located in my office in Raleigh. Mr. Picklesimer's personnel file did not encompass his supervisor's personal notes.

9. Mr. Picklesimer was properly denied access to his supervisor's personal notes. Mr. Picklesimer was not denied access to his personnel file.

Further, affiant sayeth not.

This the 17th day of May, 1994.

/s/ Ivan Hill
Ivan Hill

Subscribed and sworn to before me this the 17th day of May, 1994.

/s/ Linda J. Washington
Notary Public

My Commission expires: October 8, 1994.

(Notary Seal)

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
(SHELBY DIVISION)
FILE NO. 4:93CV74

| | | |
|---|---|---|
| EDWARD PICKLESIMER, | ) | |
| | ) | |
| Plaintiff, | ) | AFFIDAVIT IN |
| v. | ) | SUPPORT OF |
| | ) | MOTION FOR |
| LEE COX, INDIVIDUALLY, AND | ) | SUMMARY |
| IN HER REPRESENTATIVE | ) | JUDGMENT |
| CAPACITY, REX YATES. IN HIS | ) | |
| REPRESENTATIVE CAPACITY, | ) | |
| STATES OF NORTH CAROLINA | ) | |
| AND THE ADMINISTRATIVE | ) | |
| OFFICE OF THE COURTS, | ) | |
| JUVENILE SERVICE | ) | |
| DIVISION, | ) | |
| Defendants. | ) | |

Jo Ann Wright, being duly sworn deposes and says:

1. I am employed by the North Carolina Administrative Office of the Courts Juvenile Services Division as a Juvenile Services Secretary for the Twenty-Fifth District Court District.

2. The Twenty-Fifth District comprises Burke, Caldwell and Catawba counties with offices located in Lenoir, Morganton, Hickory and Newton.

3. I have been employed as a Juvenile Services Secretary since January 2, 1986.

4. In my capacity as Juvenile Services Secretary, I have regular contact with the Court Counselors and Chief Court Counselor for District Twenty-Five.

5. I observed the interaction between Ms. Cox and Mr. Picklesimer.

6. It appeared Ms. Cox and Mr. Picklesimer had a professional working relationship.

7. I never observed Ms. Cox engage in anything other than professional conduct.

8. It did not appear to me that Ms. Cox was engaging in a course of conduct or even isolated individual acts with the purpose of causing Mr. Picklesimer emotional distress.

9. I do not know of any conduct by Ms. Cox that would have caused Mr. Picklesimer's heart problems. It appears to me that Mr. Picklesimer's heart problems were the result of this poor eating habits.

10. It did not appear to me that Mr. Picklesimer carried a caseload, or workload, disproportionate to other Court Counselors.

Further, affiant sayeth not.

This the 17th day of May, 1994.

/s/ Jo Anne Wright
Jo Anne Wright

Subscribed and sworn to before me this the 17th day of May, 1994.

/s/ Elizabeth P. Jackson
Notary Public

My Commission expires: November 17, 1996
(Notary Seal)

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
(SHELBY DIVISION)
FILE NO. 4:93CV74

| | | |
|---|---|---|
| EDWARD PICKLESIMER, | ) | |
| | ) | |
| Plaintiff, | ) | AFFIDAVIT IN |
| v. | ) | SUPPORT OF |
| | ) | MOTION FOR |
| LEE COX, INDIVIDUALLY, AND | ) | SUMMARY |
| IN HER REPRESENTATIVE | ) | JUDGMENT |
| CAPACITY, REX YATES. IN HIS | ) | |
| REPRESENTATIVE CAPACITY, | ) | |
| STATES OF NORTH CAROLINA | ) | |
| AND THE ADMINISTRATIVE | ) | |
| OFFICE OF THE COURTS, | ) | |
| JUVENILE SERVICE | ) | |
| DIVISION, | ) | |
| Defendants. | ) | |

Richard A. Bruder, being duly sworn deposes and says:

1. I am employed by the North Carolina Administrative Office of the Courts Juvenile Services Division as a Lead Counselor for the Twenty-Fifth District Court District.

2. The Twenty-Fifth District comprises of Burke, Caldwell and Catawba counties with offices located in Lenoir, Morganton, Hickory and Newton.

3. I have been employed as a Lead Counselor since July of 1993. From January 1, 1981 to July of 1993, I was employed as a Court Counselor.

4. In my capacities as a Court Counselor and Lead Counselor, I have regular contact with the other Court

Counselors and with the Chief Court Counselor for District Twenty-Five.

5. I observed the interaction between Ms. Cox and Mr. Picklesimer.

6. It appeared Ms. Cox and Mr. Picklesimer had a professional working relationship.

7. I never observed Ms. Cox engage in anything other than professional conduct.

8. It did not appear to me that Ms. Cox was engaging in a course of conduct or even isolated individual acts with the purpose of causing Mr. Picklesimer emotional distress.

9. I do not know of any conduct by Ms. Cox that would have caused Mr. Picklesimer's heart problems.

10. It did not appear to me that Mr. Picklesimer carried a caseload, or workload, disproportionate to other Court counselors. For example, in March of 1990 I assumed different duties and my caseload was assigned to Mr. Picklesimer. Mr. Picklesimer assumed the same cases I was carrying. I, also, have been assigned the Training School Specialist role assigned Mr. Picklesimer. When I assumed the role I carried more cases than Mr. Picklesimer carried when he had those duties. The current District Twenty-Five Training School Specialist is carrying thirty-five to forty cases and has carried as many as fifty cases. Mr. Picklesimer's caseload was thirty or less. Additionally, other Court Counselors assumed some transportation duties for Mr. Picklesimer. Other Training School Specialists in the State, particularly Mr. Morrison from Winston-Salem and Ms. Wilson from Charlotte, drive greater distances to the same Training Schools serviced by District Twenty-Five. Mr. Morrison and Ms. Wilson, also routinely carry a juvenile caseload, of sixty, twice as large as carried by Mr. Picklesimer.

Further, affiant sayeth not.

This the 1st day of June, 1994.

/s/ Richard A. Bruder

Richard A. Bruder

Subscribed and sworn to before me this the 1st day of June, 1994.

/s/ Joan N. McLord
Notary Public

My Commission expires: October 25, 1994.
(Notary Seal)

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
(SHELBY DIVISION)
FILE NO. 4:93CV74

| | | |
|---|---|---|
| EDWARD PICKLESIMER, | ) | |
| | ) | |
| Plaintiff, | ) | AFFIDAVIT IN |
| v. | ) | SUPPORT OF |
| | ) | MOTION FOR |
| LEE COX, INDIVIDUALLY, AND | ) | SUMMARY |
| IN HER REPRESENTATIVE | ) | JUDGMENT |
| CAPACITY, REX YATES. IN HIS | ) | |
| REPRESENTATIVE CAPACITY, | ) | |
| STATES OF NORTH CAROLINA | ) | |
| AND THE ADMINISTRATIVE | ) | |
| OFFICE OF THE COURTS, | ) | |
| JUVENILE SERVICE | ) | |
| DIVISION, | ) | |
| Defendants. | ) | |

Thomas Danek, being duly sworn deposes and says:

1. I am employed by the North Carolina Administrative Office of the Courts Juvenile Services Division as the Administrator.

2. In my capacity as Administrator, I received a letter dated December 26, 1990 from Mr. Picklesimer requesting review of his Area Administrator's November 19, 1990 decision that he could not force his supervisor to disclose personal notes about him as an employee.

3. I forwarded the request for review to Ivan Hill the Administrator of AOC's Personnel Services Division for his review because it involved interpreting Article 7 of Chapter 126 of the North Carolina General Statutes.

4. Mr. Hill affirmed the propriety of denying Mr. Picklesimer access to his supervisor's personal notes. Mr. Picklesimer was informed by, his supervisor, his Area Administrator and Mr. Hill that his personnel file was in Mr. Hill's office in Raleigh. He had access to his personnel file but not his supervisor's personal notes about him as an employee.

5. Mr. Freeman, the Director of AOC, accepted Mr. Hill's interpretation of Article 7 of Chapter 126 of the North Carolina General statutes.

6. I received the recommendation of Ms. Cox, the Chief Court Counselor for the Twenty-Fifth District Court District, and her Area Administrator, Rex Yates, that Mr. Picklesimer be dismissed from his employment as a Court Counselor because of his persistent failure to meet Minimum Standards.

7. Minimum Standards are the absolute minimum level of service delivery required in a juvenile's case.

8. Mr. Picklesimer's documented failures included: withholding cases from review, failing to provide service to juveniles and acting as if he was above the Court by dropping juveniles from supervision while an order of probation was outstanding. These failures by Mr. Picklesimer, caused me to accept the recommendation of Mr. Yates and Ms. Cox for dismissal.

9. Despite my acceptance of Mr. Yates and Ms. Cox's recommendation for dismissal, Mr. Picklesimer was not dismissed.

10. Mr. Picklesimer terminated his own employment when he refused to transfer out of District Twenty-Five to District Twenty-One offered to him by Bob Atkinson, the then Assistant to AOC Director Freeman.

11. Pursuant to the AOC Personnel Management Manual, Section 3.20 Mr. Picklesimer was an employee at will and subject to transfer from District Twenty-Five to

District Twenty-One. Mr. Picklesimer terminated his own employment by refusing Mr. Atkinson's transfer request.

Further, affiant sayeth not.

This the 19th day of May, 1994.

/s/ Thomas Danek
Thomas Danek

Subscribed and sworn to before me this the 1st day of June, 1994.

/s/ Linda J. Washington
Notary Public

My Commission expires: October 8, 1994
(Notary Seal)

IN THE GENERAL COURT OF JUSTICE
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
(SHELBY DIVISION)
FILE NO. 4:93CV74

EDWARD PICKLESIMER,
Plaintiff,

vs.

LEE COX, INDIVIDUALLY, AND
IN HER REPRESENTATIVE CAPACITY,
REX YATES, IN HIS REPRESENTATIVE
CAPACITY, STATE OF NORTH CAROLINA
and THE ADMINISTRATIVE OFFICE OF
THE COURTS, JUVENILE SERVICE
DIVISION,
Defendants.

PLAINTIFF'S REPLY TO
DEFENDANT'S COX. MOTION
FOR SUMMARY JUDGMENT

NOW COMES the Plaintiff, Edward Picklesimer, by and through his attorney the undersigned attorney replying to the Defendant's Motion for Summary Judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure and, in support of said response, respectfully submits that attached material:

1. Affidavit of Plaintiff, Edward Picklesimer.
2. Affidavit of Evelyn J. Picklesimer.
3. Motion of Allow Late Filing.

Plaintiff specifically objects to the following portions of the Memorandum and Recommendation filed in this action on June 24, 1994:

1. Plaintiff objects to assertion of I. that the Plaintiff quit his work from the State. It being the contention of the Plaintiff that he was terminated or forced to resign;

2. The determination by Judge Davis that the Plaintiff failed to satisfy Rule 56(e).

3. The determination by Judge Davis that the Defendant is entitled to qualified immunity and summary judgment in her favor as set forth in III.

4. The granting of Defendant's Motion for Summary Judgment as to IV Protected Speech.

5. The granting of Defendant's Motion for Summary Judgment as to the Third cause of action for intentional inflection of emotional distress.

6. The recommendations that the Defendant's Motion for Summary Judgment be granted in its entirety, that Plaintiff's first and third causes of action be dismissed with prejudice, and that Judgment be entered in Defendant's favor on all issues.

In support of the Plaintiff's objections to the Memorandum and Recommendation previously filed by the way of Memorandum of Law, the Plaintiff says and alleges as follows:

## I. ARGUMENT

The Federal law of Summary Judgment closely parallels North Carolina State law regarding the use of this procedural device. In a motion for Summary Judgment, the burden is on the moving party to establish there is no genuine issue of material fact and that the movant is entitled to judgment as a matter of law. Gavin v. Peoples Natural Gas Co., 613 F. 2d. 482 (Pa 1980); Norfolk & Western K.

Co. vs. Werner Industries, 286 NC 89, 209 SE 2d 734 (1974) [other citations omitted]. An issue is material if the facts alleged would constitute a legal defense, or would affect the results of the action or it its resolution would prevent the party against whom it is resolved from prevailing in the action. An issue is denominated "genuine" if it may be maintained by substantial evidence. Koontz v. City of Winston-Salem, 280 NC 513, 186 SE 2d 897 (1972) [other citations omitted].

The critical questions for determination by the Court in considering a motion for Summary Judgment is whether the pleadings, depositions, answers to interrogatories and admissions on file, together with any affidavits, establish a genuine issue as to any material fact. Associated Press vs. US, 326 U.S. 1, 65 S Ct 416 89 L Ed 2013 (1945), rehearing denied 326 US 802, 66 S Ct 6, 90 L Ed 489, (1945); Johnston Co. Tuberculosis Assoc. v. NC Tuberculosis & Respiratory Disease Assoc., 15 NC App 492 190 SE 2d 264 (1972) [other citations omitted]. A Court must look at the record in the light most favorable to the party opposing the motions (Clifton v. Fesperman, 50 NC App 178, 272 SE 2d 624 (1980)), and Plaintiffs are entitled to the benefit of every reasonable inference which may legitimately be drawn on their evidence. Vickery v. Olin Hill Construction Co., Inc., et. al., 47 NC App 98, 266 SE 2d 711 (1980).

Before Summary Judgment may be had, the record must affirmatively show that not only would the moving party be entitled to judgment from the evidence before the Court, but it must also show that there can be no other evidence from which a jury could reach a different conclusion as to a material fact. SEC v. International Mining Exchange, Inc., 515 F Supp 1062 (Colo 1981); Goode v. Tait, Inc., 36 NC App 268, 243 SE 2d 404, cert. denied 295 NC 465, 246 SE 2d 215 (1978) [other citations omitted].

The failure on the behalf of the Plaintiff to comply with Rule 56(e) of the Federal Rules of Civil Procedure was

due to an inadvertence or clerical error which has been previously alleged; and it is therefore respectfully requested that this Reply, Affidavit, and Memorandum of Law be reviewed by the Court as satisfying your requirements of Rule 56(e).

## II. QUALIFIED IMMUNITY

The remaining Defendant, Lee Cox, in her individually capacity has moved for Summary Judgment and asserted there is no genuine issue of material fact as to whether she is entitled to qualified immunity.

The test regarding qualified immunity states that "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutionally rights of which a reasonable person would have known" [emphasis own]. Harlow v. Fitzgerald, 457 US 800, 102 S Ct 2727, 73 L Ed 2d 396 (1982). Whether state and local executive or administrative officials are accorded only qualified immunity from liability under 42 USC § 1983 depends upon the circumstances and motivations of Defendants' actions as established by evidence at trial. Williams v. Anderson, 562 F. 2d 1081 (Ark 1977). Further, the qualified immunity/good faith defense to actions brought under 42 USC § 1983 contains subjective and objective components; the question is not only whether Defendants acted with good intentions, but whether they had reasonable grounds for forming belief formed at time and in light of all circumstances that their conduct was constitutional. Duchesne v. Sugarman, 566 F. 2d 817 (NY 1977). As previously stated by Plaintiff and by corroborating evidence, there is an issue of fact as to whether the extent of the knowledge of behalf of Defendant was usurping the constitutional rights of Plaintiff and others, and their inaction in light of their knowledge serves as the basis for Plaintiffs

claim. For that reason, Defendant's Motion for Summary Judgment based on qualified immunity should have been denied and Plaintiff should be permitted to offer evidence for the trier of fact to determine.

It is respectfully contended that the Plaintiff has offered through the Affidavit of the Plaintiff and the forecast of evidence contained therein as well as the affidavit of Mrs. Picklesimer genuine issued of material fact. It should be remembered that all inferences, including creditability of an affiant, are drawn in favor of the Plaintiff for qualified immunity purposes. Gordon v. Kidd, 971 F. 2nd 1087, 1093-94 (4th Circ. 1992). It is undisputed that the right allegedly violated by the Defendant against the Plaintiff was clearly established at the time, and from the Affidavit of the Plaintiff which was taken as true, there is evidence that the State official, in this case, Ms. Cox, new that her conduct was unlawful and despite such knowledge persisted in that conduct all of which are genuine issues of material fact. The Plaintiff has established in his Affidavit, and from the forecast of evidence that the activities of the Defendant were not responsible, or in violation of a clearly established law, were corrupt, malicious, and beyond the scope of her official duties. It is contended that the Plaintiff has met the burden of showing all of this by his Affidavit and the attachments; therefore, the Defendant is not entitled to Summary Judgment in her favor as to the defense of qualified immunity.

## III. PROTECTED SPEECH

The Defendant has contended that the Plaintiff's first amendment claim cannot survive Summary Judgment because the Plaintiff has been unable to produce any evidence that his "speech" was on a matter "public concern" as required under Connick v. Myers, 461 US 138 (1983), Berger v. Battaglia, 779 F. 2nd 992 (4th Circ. 1985).

Plaintiff contends that he was terminated from employment in violation of his rights protected by the First Amendment of the United States Constitution. The proper test for evaluating Plaintiff's claim is set forth in Daniels v. Quinn, 801 F. 2d 687 (4th Cir. 1986);

To determine whether the First Amendment shields a public employee from discharge for protected speech, we must use a three-part inquiry. (Since each part affords a possible independent basis for judgment, the order of inquiry may vary with the circumstances of the case.)

The first step is to ask whether the speech was about a matter of legitimate public concern. This question is one of law, not of fact. Jones v. Dobson, 727 F. 2d 1329, 1334 (4th Cir. 1984).

If the speech was about a matter of public concern, the question becomes whether the employee would have been discharged "but for" the speech. The defendant-employer will not be liable if the discharge would have occurred for other reasons, such as the plaintiff's own incompetence. This classic motivational question is one of fact. The employee bears the burden of demonstrating that protected speech was a motivating factor in the discharge.

The burden then shifts to the employer to show that it would have reached the same decision even in the absence of the protected conduct. Mt. Healthy v. Doyle, 429 U.S. at 287, 97 S. Ct. at 576.

If protected speech was the "but for" cause of the discharge, courts must still inquire whether the degree of public interest in the employee's statement was nonetheless outweighed by the employer's responsibility to manage its internal affairs and provide "effective and efficient" service to the public. If so, then the employer will not be liable. This question is ultimately one of law. Connick v. Myers, 461 U.S. 138, 103 S. Ct. 1684, 75 L. Ed. 2d 708 (1983).

That the Affidavit of the Plaintiff clearly establishes that the speech complained of was constitutionally protect

since it (1) related to matters of public concern Connick v. Myers, supra, at 146; and (2) the interest of the Speaker in the speech outweighted the interests of the employer in maintaining an efficient work place, Pickering v. Board of Education, 391 U.S. 563 (1968). The speech complained of could be fairly considered as relating to matters of political, social, or concern to the community as required by Connick and clearly was protected by the First Amendment. Here both prongs of the tests were clearly met as shown by the Affidavit of the Plaintiff were it considered to be true at this juncture; and therefore, Motion for Summary Judgment should have been denied.

## IV. INTENTIONALLY INFLICTION OF EMOTIONAL AND MENTAL DISTRESS

It is respectfully contended that the essential elements in an action for intentional infliction of emotional distress are: (1) extreme and outrageous conduct by Defendant; (2) which is intended to and does, in fact, cause; (3) severe emotional distress. Dickens v. Puryear, 302 NC 437, 276 SE 2d 325 (1981). In the context of the claim of intentional infliction of mental distress, the Court has stated that "the term severe emotional and mental distress means any emotional and mental disorder, such as for example neuroses, psychoses, chronic depression, phobia, or any other type of severe and disabling emotional or mental condition which may be generally recognized and diagnosed by a professional trained to do so." Waddle v. Sparks, 331 NC 73, 414 SE 2d 22 (1992), quoting Johnson v. Ruark Obstetrics and Gynecology Assn., 327 NC 283, 295 SE 2d 85, rehearing denied 327 NC 644, 399 SE 2d 133 (1990).

Plaintiff contends that the conduct exhibited by Defendant in this case was extreme and outrageous and without justification and which was intended to cause Plaintiff to suffer mental and emotional trauma. Plaintiff's

own affidavit and the affidavit of his wife, which is offered for corroboration, detail the effect of the actions of the Defendant upon the Plaintiff.

Defendants cite numerous cases which support their position that Defendants in the instant action did not act in either so extreme or so outrageous a manner as to support a claim for intentional infliction of emotional distress. However, as demonstrated by affidavits and depositions in this case, it is apparent that the conduct exhibited by Defendants placed Plaintiff's entire career and livelihood, that which he had invested numerous years of his life, in jeopardy. The severity of Defendants' conduct is an issue of fact for jury determination and should survive a motion for Summary Judgment. Similarly, Plaintiff's forecast of his evidence provides a factual issue as to the elements of intent and causation for a fact finder to determine. Finally, the severity of emotional distress Plaintiff suffered is documented in his affidavit and corroborated by supporting affidavits. Plaintiff was, in fact, suffering from chronic depression to such a degree that he was effectively unable to conduct his personal and family affairs. Said depression would have been recognized and diagnosed as such by a competent professional of proper training, experience and expertise. (See generally Diagnostic and Statistical Manual of Mental Disorders - Third Edition - Revised pp. 222-224.)

In addition to the depression, the Plaintiff suffered from coronary problems which were well-known to the Defendant who despite this knowledge engaged in a course of activity that she knew or likely should have known would increase the anxiety and potential for additional heart problems in the Plaintiff.

That the Plaintiff's affidavit clearly establishes as well as the affidavit of the corroborating witness, that such activities on the part of the Defendant did in fact cause additional problems. The forecast of evidence from the doctor clearly indicates that all of the requirements for the

proving of a case for intentionally infliction of emotional distress or, in the alternative, negligent infliction of emotional distress have been met; and therefore, motion for Summary Judgment should be denied.

## V. CONCLUSION

For the reasons as set forth herein it is respectfully contended that the Motion for Summary Judgment should be denied for that there are genuine issues of material facts presented by the Plaintiff requiring this submission of this case to the jury for determination.

This the 22nd day of July, 1994.

C. GARY TRIGGS, P.A.

BY: /S/ C. Gary Triggs
C. Gary Triggs
Attorney for Plaintiff
North Carolina State Bar No. 5865
Post Office Drawer 579

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
(SHELBY DIVISION)
FILE NO. 4:93CV74

| | | |
|---|---|---|
| EDWARD PICKLESIMER, | ) | |
| | ) | |
| Plaintiff, | ) | AFFIDAVIT IN |
| v. | ) | SUPPORT OF |
| | ) | PLAINTIFF'S |
| LEE COX, INDIVIDUALLY, AND | ) | REPLY TO |
| IN HER REPRESENTATIVE | ) | MOTION FOR |
| CAPACITY, REX YATES. IN HIS | ) | SUMMARY |
| REPRESENTATIVE CAPACITY, | ) | JUDGMENT |
| STATES OF NORTH CAROLINA | ) | |
| AND THE ADMINISTRATIVE | ) | |
| OFFICE OF THE COURTS, | ) | |
| JUVENILE SERVICE | ) | |
| DIVISION, | ) | |
| Defendants. | ) | |

Edward Picklesimer, being first duly sworn, deposes and says:

1. My name is Edward Picklesimer. I am the Plaintiff in the above-captioned action and presently reside in Burke County, North Carolina.

2. I was employed as a Court Counselor for the Twenty-Fifth Judicial District in Morganton, North Carolina, beginning on January 1, 1976.

3. From January 1, 1976, until April 15, 1988, and from October, 1989, to May 1, 1990, I had as my immediate supervisor the Defendant, Lee Cox.

4. During a brief period of time from May of 1990 until the end of March, 1991, I had as a temporary supervisor, Randolph Turbeville.

5. The actual classification for my job with the State was as Court Counselor serving in the Burke County Juvenile Court; however, during the term of my employment, I had various other title which included Intake Counselor, Training School Specialist and Court Counselor; however all of these are classified within the North Carolina state system as a Court Counselor.

6. Originally, when I began my employment, I worked the three (3) counties that encompassed the Twenty-Fifth Judicial District namely, Burke, Caldwell and Catawba. However, beginning in May of 1976, after another counselor was hired for Catawba County, I worked in Burke and Caldwell County.

7. Originally, there were three (3) counselors namely, myself, Charles E. Taylor and Brenda Saunders. However, at a later time, Brenda Saunders left the employment to take a position in the Holshouser administration, leaving myself and Mr. Taylor as the Court Counselor for Burke County.

8. To my knowledge, Mr. Taylor experienced many of the same problems with the Defendant, Cox, that I experienced, including personal attacks, snide remarks and dissemination of improper information until he eventually resigned in the Fall of 1988. Beginning in approximately 1985, I began having personal problems with the defendant, Lee Cox, which resulted in consistently poor evaluations. It became apparent to me and others that were working with me that despite anything I did, I would receive a negative evaluation from Ms. Cox. This led me to complain routinely to the administrative office of the courts or other persons in the chain of command concerning what I perceived as a personal conflict between Lee Cox as Chief Court Counselor and myself.

9. On April 21, 1989, I caused to be sent a reply to the evaluation for that period that I had received from Ms. Cox, a copy of said reply being attached hereto, marked as

"Exhibit A" and incorporated herein by reference. Said reply summarizes many of the problems that I had encountered, as well as the very demeaning attitude that she presented to me.

10. The evaluation that was done by Ms. Cox on April 12, 1989, was performed while I was still recuperating from heart surgery that I had undergone on December 7, 1988. Clearly, her evaluation indicates and is indicative of her general dislike for me and the overall negative impressions that she gives or tried to imply. A copy of the evaluation is attached, marked "Exhibit B" and incorporated herein by reference.

11. Ms. Cox consistently tried to single out issues that she could make attacks on me, both in my professional capacity and personally. She generally centered her attacks on what she contended was "persistent and constant problems with keeping records current and attitude." Obviously, attitude is a subjective term which could be viewed differently by many people. The attitude exhibited by Ms. Cox was one of arrogance and indifference to me as a counselor and to my role in the judicial system. This constantly aggravated me which would seem to make her happy since her declared goal was to "drive me from my position." I addressed her concerns concerning my attitude clearly in the April 21, 1989, Reply which is attached and marked Exhibit "A" to all other parties who would listen. I loved my job, and enjoyed the people that I worked with save and except for Lee Cox who made my work unduly burdensome and my working conditions intolerable. It became very apparent that Ms. Cox had no respect for me professionally or personally, and I likewise shared that feeling regarding her performance as a Supervisor.

12. Ms. Cox consistently wrote evaluation which would pick apart any good work that I did and give an overall negative opinion which was not reflective of the quality or quantity of work that I was performing in my capacity as Court Counselor. It is very evident that and

became painfully clear that she was attempting to build a negative record in my personnel file for the sole and exclusive purpose of creating an environment conductive to my being either terminated or transferred, or in the alternative ground work for her to establish a basis for my termination. As early as 1989, Ms. Cox told me directly that she "intended to document here file so that she would have a basis to terminate me at some time in the future." When I confronted her about the statements, she said "do you understand what I mean?" At which point I said "I certainly do; if I have doing anything that gives you grounds, you will fire me", and she replied, "exactly".

13. The strain of working with a supervisor who has the avowant purpose of terminating your or on the alternative documenting your personnel file with negative evaluations, clearly begin to take its toll on me individually both psychologically and physically.

14. Ms. Cox is very quick to boast about of being able to write a report giving negative comments to be used as a basis for future action if she deems it appropriate. She not only did this with regard to my file, she also did this with regard to Mr. Taylor's file, and anyone else who had the intestinal fortitude to challenge her lack of supervision or her unprofessional attitude. My sole sin with Lee Cox was to point out to her that she was not handling her job responsibly or in an appropriate fashion which immediately made me the enemy and created a personal conflict between she and I which carried over n her mind to my professional responsibilities and my job performance evaluation.

15. I felt and still feel as a Court Counselor that the public in general and the officials about Lee Cox in particular needed to know what was going on in our district as it related to the supervisory staff over the Court Counselors. This is a very responsible position which requires a personal who has both the professional capability and the personal ability to deal with the subordinance below

them and provide a working environment conductive to the best possible job being done for the individuals that are handled through the intake system and through the juvenile system. There is probably no more important job, in my opinion or as voiced in the opinion of the State, than dealing with the children of this state who are our future. I took my job very seriously and tried to do the best job that I could, often times in spite of the interference of my supervisor who was suppose to be helping not hindering my efforts.

16. It became very apparent especially for the last three years of my employment, that Lee Cox individually hated me and would do anything or say anything including lies to try to force my termination or my resignation. She on more than one occasion told me both directly and through other individuals that Charlie Taylor and I were "thorns in her side". It was very obvious to both myself, Mr. Taylor, and anyone else in our department that Lee Cox hated me and wanted me out of her department no matter what it took.

17. Ms. Cox continually pointed out to me that I was "employee at will" and that she would see to it that I was terminated. Beginning in 1990 and 1991 she began writing letters to Rex Yates and/or other persons concerning what she contended to be my failure to meet minimum standards in cases under my control I note in her Affidavit, which I have read, that Paragraph No. 25 on Page 5 refers to one such letter dated January 14, 1991. These letters were artfully crafted to fall incompliance with her overall plan of presenting a negative assessment of my abilities and my performance assessment of my abilities and my performance.

18. It should be understood that when cases are assigned to a counsellor, often times the cases and/or the files are not in best order. Once they are received I or any other counsellor can certainly make mistakes; however, when an evaluation is done, a review of any such mistakes that are noted are then corrected within a three week period of time.

Ms. Cox certainly understands this procedure; however, no tone word was mentioned concerning that in her affidavit. Once corrections were made, either there had been a deficiency noted, that deficiency was then upgraded on evaluation routinely.

19. The incident referred to in Paragraph No. 29 on Page 6 of Ms. Cox's Affidavit is but another example of where I was signaled out from other intake counsellors some special treatment. In most cases if a file had been simply missed, it would have been discussed with the employee by the employee's supervisor, matter corrected, and that would have been the end of the problem. However, when it related to either myself or Mr. Taylor an investigation was conducted with was documented in writing all of which I contend was part of the overall scheme, plan, or design on part of Ms. Cox to document any deviation that I had as to any file or any act. This same test was not applied to their employees at the same time, working in the same position which was the subject of my chief complaint against her. I certainly was not and am not a perfect person or perfect employee; however neither was anyone else. I simply wanted to be treated and felt that I had the right to be treated or fed from the same spoon as everyone else in the department.

20. In the Affidavit filed by Ms. Cox, she states that I withheld cases. That is an absolute falsehood. At no time in my career did I ever withhold any cases. This complaint was made to my immediate supervisor at the time, Mr. Turbeville, and I am in a conversation with Mr. Turbeville advised him that I would make such corrections as were necessary but that at no time had I ever nor would I withhold anything from review. From my discussion with Mr. Turbeville, it was my belief that the matter had been resolved and that he understood what had actually happened as opposed to what Ms. Cox said had happened. The two were very different.

21. It should be understood that Ms. Cox's entire method of dealing with employees was to document or she referred to it as "cover her ass" including writing letters and having other people allegedly make the decisions and her only have to implement them. While she indicated as in Paragraph 33 of her Affidavit such activity, it is very clear that it was Ms. Cox not anyone else who instigated and attempted to force my dismissal what was otherwise minor problems had anyone else been guilty of such an infraction. With me, whenever a minor infraction was a major event and immediate cause for a threat to terminate me. It was followed by written documentation which built the file she had told me was intended to terminate me. Clearly, if my activities had been so terrible for the sixteen, almost seventeen years that I worked, I would not have continued in my employment.

22. It is also rather contradictory that during the same time that I was being condemned by Ms. Cox for being such a poor Court Counsellor I was recommended for merit raises and received raises with the other individuals as the department raises were granted.

23. During my years under Ms. Cox I also contacted her superiors including Franklin Freeman, Rex Yates and others complaining of what Ms. Cox was doing with regard to my job performance and my responsibilities. With this included on at least one occasion my contacting Franklin Freeman and advising him that Ms. Cox had falsified records along with sending him proof of such activity on her part. Obviously, it is of grave public concern if a person in a supervisory capacity is falsifying state records. This is not only improper in any office but may very well constitute a criminal offense. This is certainly a matter of public interest and I felt it necessary to bring this to the department's attention.

24. The case complained of is discussed by Ms. Cox in her affidavit beginning on Page Thirteen (13) number

Sixty-Seven (67) and continuing through Seventy-Four (74) which clearly points out that although she admits that she did in fact falsify records namely noting that she had checked records which she did not in fact check, she explains it a way again as a failure on my part and points it out as a negative reflection on my record rather than any wrongdoing on her part. This is consistent with her entire course of supervision. Anything that she did that was wrong was covered up, glossed over or falsified. This particular case arose when I refused to accept the transfer of a case from another counselor within our department because the file had not bee reviewed in over six (6) months which, if it had been an oversight of that type on my part, would have resulted in a written letter of explanation and a negative report going to my file. It is very evident that her entire statements in Sixty-Seven (67) through Seventy-Four (74) show that on this occasion she was attempting to gloss over or cover up deficiencies in the state which is exactly what she had complained about me doing on other occasions. In Paragraph Seventy-Three (73) here explanation is that she did not suffer any adverse job consequences for her failure to point out Mr. Picklesimer's inadequacies on the June 5, 1987, records of view, when in fact, the very issue came to light because I complained that she had falsified the records. Obviously, if I had anything to hide or felt that I had done anything inappropriate, I would not have pointed out her falsifying the record. Despite admitting what had happened, she again attempts to paint it as a negative slur on my record and not tell the truth about what actually happened. This is exactly the same type conduct that she exhibited towards Mr. Taylor which resulted in his resignation after seventeen to eighteen years of service.

25. It is my testimony and I feel will be testimony from witness that I intend to call, including Mr. Taylor and others, that this type activity is indicative of the method of supervision of Lee Cox where employees who had a

significant amount of longevity with the state, in our cases sixteen to seventeen years respectively, were systematically singled out for bad treatment and possible termination. It is my further belief and my forecast of evidence that from the witnesses which will be adduced at trial and from the Discovery that will be obtained in this case through depositions and other documents, that it will be clearly shown that anyone who voiced any objection to any inadequacies or improprieties committed by Ms. Cox were singled out for disciplinary action and/or negative reviews. Ms. Cox placed herself in a position as controlling not only the department but the dissemination of any information what went on in the department and anyone who voiced any objection or attempted to point out to the supervisors to the public what was actually going on reviewed as the "enemy" and were thereafter placed on a hit list of individuals that she intended to rid herself and the state of.

26. With regard to my last evaluation it is my contention and my belief that from the evidence that I would induce at trial, including the testimony of my wife, Evelyn Picklesimer, Kim Robins and perhaps another counselor, that my last evaluation was in fact completed by Mr. Turbeville but not submitted despite my numerous requests for the submission of the same. I requested a copy of my evaluation from Ms. Cox and received a response from Ms. Cox on November 25, 1991; a copy of which is attached, the import of this evaluation was obvious since I was being considered for termination or transfer, however, it is my belief and I feel that the evidence will clearly show that Ms. Cox again interfered to portray a negative image saying that there was only an oral report and not even providing me with the rough notes that she admitted that were in process so that we could review those with the appropriate supervisors. In the letter it is very clear that she says there is no evaluation on November 25, 1991, however, in the Affidavit, under oath, on Page Four (4) Paragraph Twenty-Two (22) indicated that

the report was done orally and that the written report would be sent to his transfer sight. These statements are clearly contradictory and again point out the method used by Ms. Cox to present a negative image with regard to me in every available situation for which she had an opportunity to do so.

27. During my employment with the state, while under the supervision of the Defendant Ms. Cox, I filed at least four (4) grievances, which I intend to offer to the trial of this matter as evidence all of which related to Ms. Cox failure as a supervisor, her inadequacies in administrative duties and her personal attacks on me and consistently false negative reports. I felt it appropriate to point this out however no action was ever taken against Ms. Cox since she was clearly higher in the chain of command than I was. Likewise, I was not terminated either.

28. It is my belief and was my belief in 1990, that the personal notes of the Defendant would indicate that she had been deceptive and dishonest in her evaluations of me and was engaged in a plan to cause me to either lose my job or be forced to resign, however, when I asked for these notes she objected and that objection was eventually upheld by Mr. Danek, administrator of the Juvenile Services Division and by Mr. Hill, personnel director, however, after I pointed out the federal law relating to such activities each of these individuals relented and I was allowed access to the files she kept in the Lenoir office on me personally. However, it is my belief that during the period from my original request until the time that I got to see the files, she had affectedly "cleaned" the files so that no negative conclusions were in the file. While in her affidavit she points Paragraph Fifty (50) and surrounding paragraphs, the action that Mr. Hill initially at no point does she acknowledge that action was later rescinded which the evidence would show. In the affidavit of Ms. Cox she proports to be a medical expert which is a talent that she had never previously conveyed to me was within her job description or specialization, however,

she is again inaccurate. My medical condition and the strain on my heart I contend and feel that be the evidence from my treating physician would clearly demonstrate that the stress associated with her actions against me were a precipitating cause or at least, contributed to my condition.

29. With regard to my claim for severe emotional and mental distress I intend to offer evidence from myself, my wife, my physician, Clay Richardson of Glen Alpine, North Carolina, Charlie Taylor and others as to the dramatic effect the strain of her actions against me cause during the last three (3) years of my employment. Such evidence will clearly show that I lost sleep, was very nervous and irritable, could not eat on occasion, had recurrent bouts of angina, loss of self worth and feelings of hopelessness and despair, all or which I contend and feel the evidence will clearly show at the trial of this matter were caused by the pressure I was under at work and the actions that she had undertaken. The systematic actions on the part of Ms. Cox to falsely document my file, seek my termination of employment after sixteen (16) years, demean my character and reputation both within my profession and within the community all create an environment in which these things occurred.

30. It is my contention and I feel the evidence as adduced from the witnesses that I have alluded to will show that this action was outrageous and did cause severe emotional and mental distress to me, or in the alternative, she was so negligent as to cause negligent infliction of emotional mental distress which was beyond all bounds of reason and should not be tolerated in a civilized society.

31. My evidence will further show very clearly I contend, both for my testimony and the testimony of other witnesses, that these actions were intentional, or in the alternative, so negligent as to constitute actionable negligence with the intention being to cause severe emotional and mental distress to me which in fact it did. I

advised Ms. Cox on one or more occasions that she was "not trying just to have me terminated but trying to ruin me." I advised her that I was having severe distress over facing the possibility of losing my employment and health benefits with the heart condition that I have knowing full well the future treatment that I would need and that I could not obtain insurance given my condition to which she made no response.

32. It is my belief that my wife will testify that during this period of time I lost weight, lost sleep, was nervous and unable to perform my normal duties and was so irritable as to cause marital problems for the first time in our marriage and that all of this was clearly and directly attributable to the activities on the part of Ms. Cox in trying to terminate me from my long time employment with the state.

33. Ms. Cox in Paragraph Eighty-Four (84) states presumably as a fact, that my heart problems were caused by consistently poor dietary habits which I deny. The original heart problem that I had required triple by-pass surgery. I have never had a heart attack to my knowledge and know of no coronary disease until the same was discovered by accident in a routine physical.

34. The stress that I have endured under Ms. Cox clearly created severe anxiety on my part and from the testimony that I intend to offer, led to the problems that I experienced with my heart.

35. In Paragraph Eighty-One (81) Ms. Cox alleges that I did not dispute my ratings or accuse her of abusing me emotional stress, both of which are false. The evidence that I have and will offer at trial through my testimony and the testimony of others will clearly show that I continually disputed the ratings that I got including filing grievances and making my superiors and her superiors aware of what was going on appenderly to no avail. In addition, I was required to sign the evaluation whether I agreed to it or not and

thereafter each signature was argued by her to be acceptance of the report which was not true and the evidence will not support such a conclusion. I on numerous occasions advised her about the severe emotional problems she was causing me and the stress my life was brought about by constantly being threatened with the loss of my job and the benefits that I had acquired over sixteen (16) years with the state. This will be adduced at the trial, both for my testimony and for the testimony of others.

36. It is apparent from Ms. Cox's affidavit that she did not understand or appreciate my physical condition either at the time or since that time and she is factually inaccurate as to many of the assertions made by her. The statement that I had a heart catheter is not correct. I had a heart catheterization which is entirely different. The blockage was such that surgery was required immediately. It is evident since I was clear to return to work in March of 1989 without restrictions that the problems that I had experienced prior to that time were cured. The problems that I later experienced I contend were brought about primarily by the stress I was under with Ms. Cox concerning my job and the emotional torment that I suffered at her hands.

37. My damages which I intend to offer at trial will include the loss of my salary, which at the time was Thirty-Two Thousand Five Hundred Dollars ($32,500.00) together with any increases that have occurred since that time since I have not been able to find comparable employment or any suitable employment since I have not been able to find comparable employment or any suitable employment since that time. I will also claim loss of my retirement benefits and the insurance that I had with the state, all of which amounts to an excess of One Hundred Fifty Thousand Dollars ($150,00.00). It is my forecast of evidence that the actual damages which I have suffered as a direct and proximate result of Ms. Cox acts and omissions will be in

excess of One Hundred Fifty Thousand Dollars ($150,000.00).

38. I have reviewed the affidavit of Ms. Cox filed as an affidavit in the support of the Motion for Summary Judgment and find the same to be typical of her other reporting activities containing numerous factual inaccuracies and in some respects outright falsehoods. It is my belief and forecast of evidence that at the trial the character of Ms. Cox will be clearly shown that she is not a truthful person and has a reputation within the community and within her profession as being a person who will say or do whatever is necessary to protect her interest at the expense of anyone else. It is also my belief that from the testimony that I intend to introduce from both myself, Mr. Taylor and others, I will clearly demonstrate that she does not hesitate from stating falsehoods or fabricating information if it serves her purpose.

39. I have reread my verified complaint and reassert each of the allegations contained in the complaint incorporating those allegations herein by reference as if fully stated.

40. Evidence of this is even shown in her affidavit filed with the court in which she states Paragraph Thirty-Eight (38) in which she stated under oath that I had filed two grievances. I am enclosing copies of four (4) grievances which are marked as "Exhibits" which were filed that I know of and I frankly feel that more grievances were filed unofficially.

41. At the time of my employment and subsequent forced resignation, I had not only the right but the duty to acquaint my supervisors with falsification of records and/or the illegal, demeaning and professionally unacceptable conduct of Ms. Cox. This will be shown by the trial testimony of myself, Mr. Taylor and others, which will clearly establish the type of conduct and the severity of the conduct engaged in by Ms. Cox. From my testimony I will establish that Ms. Cox clearly knew that her activities were

wrong and that despite her knowledge that such activity was not lawful and in violation of the clearly established law existing at the time that she persisted in her course of conduct which included making negative reports, filing unwarranted criticisms with superiors and generally creating a negative attitude in the minds of my supervisors about my conduct as a professional and as an employee. My testimony will reveal as will the testimony of Mr. Taylor and others that her actions were for corrupt purpose, were malicious and were beyond the scope of her duty, that being to properly supervise me in accordance with the rues established by the state. Her own statements made to me which I will testify about, clearly show that it was malicious of a personal nature which went beyond her professional responsibility and for corrupt purpose to "get this thorn out of her side." My statements in the grievances and my complaints to the supervisors concerning her falsification of records and mishandling of her position are matters of public concern. It is my belief that the evidence adduced at trial will show that the state of North Carolina through its personnel department and the Administrative Office of the Courts require an employee to notify the superiors of improper activities of another employers supervisor and failure to do so would constitute grounds for dismissal if the activity was improper or illegal. When I pointed out such activity on the part of Ms. Cox I was singled out by Ms. Cox for dismissal which included the acts that I have complained of in my complaint and have pointed out in this affidavit.

42. The public and the community are truly concerned about what their public officials do and how the Court system, particularly the Juvenile Court System, which is very secretive anyway, is involved.

43. I spoke both as an employee and as citizen on the matters that I was observing and the conduct of Ms. Cox concerning my employment and her duties as a Supervisor of Juvenile Services. It is my contention as a forecast of

evidence that once the testimony is presented concerning my grievances and statements about the acts and omissions of Ms. Cox, both as an employee and as a citizen, it will be very clear that these are matters of public concern and that my interest in presenting this speech outweighs the interest of the employer in maintaining an efficient work place.

44. The testimony offered by me directly and through the cross examination of Ms. Cox as well as the introduction of my employment records, raise increases and the testimony of the other individuals that I intend to call will clearly show that my conduct did not interfere with the maintaining of efficient work place but rather the acts and omissions on the part of Ms. Cox were the interference and that I simply attempted to point out as I am constitutionally allowed to do matters of public concern regarding issues both within and outside my employment.

45. That the real or compelling reason for my forced resignation and/or threats of termination was my speaking out on issues of public concern against the wishes of Ms. Cox who took it upon herself to systematically violate my constitutional rights.

46. The employment that was offered to me was offered on the last day of the month at 4:20 p.m. with the transfer being affective to Winston-Salem which is located over One Hundred (100) miles from my home beginning on Monday at 8:00 a.m. on the following week. The Friday after my last day on Thursday was a holiday with everything closed. It is respectfully submitted that this was not a true offer of compromise but was in affect an offer made knowing full well that with my sixteen (16) years of experience in Burke County and my entire family living in Burke County that this was not a reasonable alternative to cover their tracks and if any of the action was undertaken by me.

47. I was forced to resign from my position due to the unconstitutional acts of Ms. Cox. I was fired on Thursday the 28th by Bob Adkinson acting on behalf of

Franklin Freeman if I did not agree to the transfer to Winston-Salem. I was asked if I was quitting and I emphatically stated "I will not quit" at which time I was informed that I could consider myself terminated at that point. It is my belief that the evidence will show that I was fired for constitutionally impermissible reason and did not quit my employment.

48. During the month of October, 1990, in one or more staff meetings, Ms. Cox suggest to myself and other Court Counsellors in attendance that we should "pad our mileage" in order to make up for funds the state was not providing for office equipment and supplies. I felt that this was improper and probably illegal and discussed it with other member in attendance, one of whom sent a letter to Mr. Yates, a copy of which is attached as an Exhibit, to which no reply was ever received. This typifies that very serious breaches of rules were permitted and encouraged by Defendant Cox and at the same time she was requiring a different standard as to my performance.

/s/ Edward Picklesimer
Edward Picklesimer

I, Barbara Grimm, a Notary Public of Burke County, North Carolina, do hereby certify that Edward Picklesimer personally appeared before me this day and acknowledged the due execution of the foregoing instrument.

Witness my hand and seal this, the 22nd day of July, 1994.

/s/ Barbara H. Grimm
Notary Public

My Commission Expires: April 28, 1996

IN THE GENERAL COURT OF JUSTICE
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
(SHELBY DIVISION)
FILE NO. 4:93CV74

| | | |
|---|---|---|
| EDWARD PICKLESIMER, | ) | |
| | ) | |
| Plaintiff, | ) | AFFIDAVIT IN |
| | ) | SUPPORT OF |
| | ) | PLAINTIFF'S |
| v. | ) | REPLY TO |
| | ) | MOTION FOR |
| LEE COX, INDIVIDUALLY, AND | ) | SUMMARY |
| IN HER REPRESENTATIVE | ) | JUDGMENT |
| CAPACITY, REX YATES. IN HIS | ) | |
| REPRESENTATIVE CAPACITY, | ) | |
| STATES OF NORTH CAROLINA | ) | |
| AND THE ADMINISTRATIVE | ) | |
| OFFICE OF THE COURTS, | ) | |
| JUVENILE SERVICE | ) | |
| DIVISION, | ) | |
| Defendants. | ) | |

Evelyn J. Picklesimer, being first duly sworn, deposes and says:

1. My name is Evelyn J. Picklesimer. I am the wife of the Plaintiff in the above-captioned action and have personal knowledge of the facts contained in this affidavit.

2. I have read the Affidavit of Edward Picklesimer filed this date and familiar with the allegations contained herein having discussed those issues with my husband extemporaneous to the events occurring and from my personal knowledge as a witness to various conversations between my husband and the Defendant, Lee Cox, as well as my review of the various documents in my husband's possession related to his claims.

3. I have personally observed on numerous occasions the very demeaning and condensing attitude of the Defendant, Lee Cox, against my husband, both in public and private which is eluded to in his Affidavit, and in the complaint.

4. During the period of time complained of, I observed in my husband and discussed with him the stress that he was under which was adversely affecting our marriage. It was obvious that he was under severe emotional and mental stress caused by the concerted effort on the part of the Defendant, Lee Cox, to have him terminated from his job.

5. As a result of the acts and omissions of the Defendant, Lee Cox, my husband lost weight, lost his appetite, was very nervous, had problems dealing with me and other members of our family, and was consistently irritable or easy to anger. My husband complained of feeling bad, having headaches, dizziness, and nausea all of which directly related to the stress he was under from the acts and omissions of the Defendant, Lee Cox.

6. The effects of the stress were obvious both to me and to our doctor, Clay Richardson, who treated my husband.

7. This allegation contained in my husband's Affidavit, upon information and belief, are true and accurate.

Further, this affiant saith not.

/s/ Evelyn J. Picklesimer
EVELYN J. PICKLESIMER

I, Barbara Grimm, a Notary Public of Burke County, North Carolina, do hereby certify that Evelyn J. Picklesimer personally appeared before me this day and acknowledged the due execution of the foregoing instrument.

Witness my hand and seal this, the 22nd day of July, 1994.

/s/ Barbara H. Grimm
Notary Public

My Commission Expires: April 28, 1996